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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1633

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, a Joint Venture, JACK CHERTOK TELEVISION, INC. and DENA PICTURES INCORPORATED,

*Petitioners,*

v.

TELEPROMPTER CORPORATION and CONLEY ELECTRONICS CORPORATION,

*Respondents.*

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## MOTION FOR LEAVE TO FILE AND BRIEF OF AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *AMICUS CURIAE*

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ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## MOTION OF AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rules 35 and 42(3) of the Rules of this Court, the American Society of Composers, Authors and Publishers (ASCAP) respectfully moves this Court to grant ASCAP permission to file a brief *amicus curiae* on the following grounds:

1. ASCAP has requested permission of the parties herein to file a brief as *amicus curiae* on behalf of its members in support of petitioners. On November 14, 1973, respondent Teleprompter Corporation refused such permission, but indicated that it did not intend to file a brief in opposition.

2. ASCAP, an unincorporated membership association, has a membership of 16,074 composers and authors and 5,851 publishers. It represents its members in granting non-exclusive licenses authorizing nondramatic public performances of their musical works by users, including television and radio networks and stations, and others ranging from shopping centers to symphony orchestras as well as music systems such as MUZAK and other background music services. The members reserve the right to issue individual licenses independently of the Society. This petition is filed on behalf of all members with respect to nondramatic performances of their musical works.

3. When the question of cable television's liability for copyright infringement was before this Court in *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), the writers and publishers of musical works were not concerned with monetary damages. At that time cable television was in its early developing stage. Our *amicus* brief in that case pointed out that "in the developing stages of new media ASCAP has granted free licenses on request, or has refrained from pressing claims for infringement" and "it will make no claim for past infringement-ment" against cable television systems with respect to programs picked up from television stations. (*Amicus* brief of American Society of Composers, Authors and Publishers in *Fortnightly*, p. 7, n. 2).* ASCAP, on behalf of its members, now offers to extend that waiver until January 1, 1975, for all programs picked up by cable systems from either local or distant stations. This will give the present

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* *Cf., United States* v. *American Society of Composers, Authors and Publishers*, 331 F.2d 117 (C.A. 2 1964), where the court, discussing ASCAP television licenses, said, "Until 1949 ASCAP had granted television stations royalty-free licenses in an endeavor to assist the stations and promote the growth of the industry." (331 F.2d at 121, n. 4.)

Congress ample time to enact appropriate legislation concerning copyright liability of cable television under present and foreseeable future conditions.

4. If the *Fortnightly* doctrine is applied to vast cable enterprises such as Teleprompter (unlike the small local systems in the *Fortnightly* case), composers and authors will be very seriously prejudiced. The copyright law limits the right of performance of musical work to those performances which are both "public" and "for profit". Unlike the broadcasting of motion pictures or network programs, musical works may be performed by television or radio broadcasters without obtaining a copy of the work from the copyright owner. Copies of musical works, whether in the form of sheet music, records, tapes, or electronic devices, are readily available from many sources.

Nondramatic uses of musical works are usually made on a multiple use basis, that is, a vast number of separate works of many composers, authors and publishers are performed daily by each user. If the use is by a "public broadcasting" station, it usually makes no payment to the composer or copyright owner; if it is by a commercial station the payment is related to the receipts of the particular station from the public. Many programs on cable television, especially those which are not interrupted by commercial advertising, are originally broadcast by public television stations which pay nothing to the composer. The cable system, on the other hand, receives substantial payment from the public for its participation in the performance. If the composer is to be paid for the value of his music on these programs such payment must come from the owners of the commercial cable systems. This applies to local as well as distant programs.

5. The programs in the *Fortnightly* case were motion pictures. They were leased to broadcasters presumably at

a rate commensurate with possible local exposure. They were viewed by subscribers of the cable system in the local area. The original broadcast could not have been made without receiving the physical film from the motion picture producer and paying the required price. This also applies to the commercial networks. No commercially successful motion picture or network program is available to public broadcasting stations because they cannot meet the prices that competing local commercial stations are willing to pay. But the best music is available to and is used by local and distant public television stations, usually without any payment. It is broadcast generally without receiving any tangible article from the composer or copyright owner. The rule announced in *Fortnightly*—that the CATV system does not "perform"—should be reviewed in the light of present-day conditions and the unexpected vast reach of the decision.

6. The Court is respectfully requested to reconsider its conclusions in *Fortnightly*: (a) "that petitioners systems did not 'perform' . . . in any manner envisioned by the Congress that enacted the law of 1909" (*Fortnightly*, at 395 and n. 15), and (b) its reliance on an admittedly erroneous statement in Nimmer on Copyright concerning the application of *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931) "outside of its own factual context" (*Fortnightly* at 401, n. 30). These points are discussed at pages 12 to 21 of the accompanying brief.

7. It is respectfully submitted that the *Fortnightly* case should be expressly limited to its facts and that a new rule should be formulated applicable to substantial cable television systems of the type now before this Court. If that is done, the new rule can be made effective prospectively, preferably commencing after the adjournment of the present Congress—as of January 1, 1975. This will protect

cable systems against all claims for past uses as well as those that may occur in the intervening period. It will give Congress time to act, and will give all parties concerned a chance to work out new arrangements for the future.

8. The implications of *Fortnightly* as to music are more severe than the application of *Fortnightly* to motion pictures and network programs, and they affect other areas than cable systems. This is not likely to be brought to this Court's attention by the parties to this suit.

Respectfully submitted this 21st day of November, 1973.

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## BRIEF OF AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *AMICUS CURIAE*

This brief will be limited to points that may not be covered by petitioners Columbia Broadcasting System, Inc., *et al.* ("CBS"). It will start with the premise that *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968) was a hard case for this Court to decide, facing on the one hand, the economic situation of cable systems of the type then before the Court and the importance of avoiding a serious economic threat to the development of a new field of mass communication; and on the other hand, the stubborn fact that *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931) and the many cases involving radio broad-

casting, had held that under the Copyright Act of 1909 a "performance" may occur by the activation of electronic impulses that recreate a performance—one in which living actors or artists performed at another place and possibly at another time.

In reaching the conclusion that *Jewell-LaSalle* was not applicable to the situation in *Fortnightly*, this Court concluded that *Jewell-LaSalle* was "a questionable 35-year old decision that in actual practice has not been applied outside its own factual context" (*Fortnightly* at 401, n. 30). This conclusion was based on a statement in Nimmer on Copyright which was quoted in the dissenting opinion in *Fortnightly* at 405, n. 3. It will be shown that the statement was contrary to the facts. There was nothing in the *Fortnightly* record to support the Nimmer statement.

Another reason given by the Court in *Fortnightly* for not applying *Jewell-LaSalle* was that legislative history indicated that Congress in 1909 intended to apply the right of performance only to the "conventional situation" of the presentation of a play in a theater. It is respectfully submitted that the legislative history, in fact the very Report cited in *Fortnightly* (H.R. Rep. No. 2222, 60th Cong., 2d Sess.—1909), as well as the provisions of the Copyright Act of 1909 itself, show that a rendition by mechanical means was to be treated as a "performance" by the person activating the mechanical device.

## Question Presented

Do cable systems such as those operated by Fortnightly perform copyrighted works with respect to programs emanating from local stations as well as distant stations? More specifically, should the decision in *Fortnightly Corp.* v. *United Artists Television, Inc.* be restricted to its facts and should a new rule be formulated for prospective application to cable television systems such as those operated by Teleprompter in this case?

## Statutes Involved

Section 1(d) and (e) of the Copyright Act, 17 U.S.C. Section 1(d) and (e) provide:

"Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

* * *

"(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and

"(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced . . . And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof. . . . The payment of the

royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. . . ."

There are only two limitations on the right of "public performance for profit"; one is contained in the last paragraph of Section 1(e). It provides that:

"The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."

The other limitation is contained in Section 104 of Title 17. It exempts certain nonprofit, charitable and educational performances. It provides:

". . . That nothing in this title shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit."

## H.R. Report No. 2222 to Accompany 1909 Copyright Bill—Appendix

The *Fortnightly* opinion in interpreting the Copyright Act of 1909 relied upon certain statements of the Currier Committee which reported the 1909 bill for the 60th Congress, Second Session (H.R. Rep. No. 2222, 60th Cong., 2d Sess. 1 (1909)).

Relevant excerpts from that report are set forth in the Appendix.

## Summary of Argument

1. *Fortnightly* should be limited to its own facts. The Court should reexamine the basis on which it reached the conclusion that "Viewers do not perform" (*Fortnightly* at 398) and that "CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry." (*Fortnightly* at 400-401)

A. The 1909 House Report No. 2222 accompanying the 1909 Copyright bill shows that Congress intended to grant a broad right of performance and to treat listeners (or viewers) as "performers" if they activate devices which reproduce a performance by the use of mechanical means.

B. The Copyright Act itself, particularly Section 1(e) shows the intent of Congress to treat one who activates a receiving device as a performer. There is no *liability* unless the performance is *public*.

C. *Jewell-LaSalle* rather than *Fortnightly* should be applied to the Teleprompter type of cable system. This would carry out the clear mandate of the Congress that reproductions of performances by mechanical means were to be treated as new performances.

The *Jewell-LaSalle* holding has been applied since 1931 to the reproduction of radio broadcasts by use of loud speakers in hotels, bars, restaurants, and other commercial establishments. The statement in Nimmer on Copyright to the contrary, relied on by the Court in *Fortnightly*, has been shown to be incorrect.

2. The cable systems operated by Teleprompter are a far cry from those in *Fortnightly* and actually received much more money from the public for the use of copyrighted works—at least musical works—than many of the stations whose programs they carry.

3. The *Fortnightly* case should either be limited to its facts or should be overruled prospectively, possibly as of January 1, 1975, to give the present Congress sufficient opportunity to enact a new law.

## ARGUMENT

### I.

**_Fortnightly_ should be limited to its own facts. The Court should reexamine the basis on which the conclusion was reached in _Fortnightly_ that "Viewers do not perform" (_Fortnightly_ at 398) and that "CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry." (_Fortnightly_ at 400-401)**

**A. The 1909 House Report No. 2222 accompanying the bill which became the Copyright Act of 1909 shows that Congress intended to grant a broad right of performance and to treat listeners (or viewers) as "performers" if they activate devices which reproduce a performance by the use of mechanical means.**

_Fortnightly_ states that the cable systems which were then before the Court "did not 'perform' the respondent's copyrighted works . . . in any manner envisaged by the Congress that enacted the law in 1909." (p. 395). The following legislative history is cited in support of this statement (p. 395, n. 15):

> "[15] The legislative history shows that the attention of Congress was directed to the situation where the dialogue of a play is transcribed by a member of the audience, and thereafter the play is produced by another party with the aid of the transcript. H. R. Rep. No. 2222, 60th Cong., 2d Sess., 4 (1909)."

This is again referred to as an indication of "the conventional situation contemplated by the framers of the Copyright Act" (_Fortnightly_, at 398, text and n. 22).

It is respectfully submitted that this discussion by the 1909 Committee had nothing to do with the right of performance. It related to a new right respecting unauthorized copies of an unpublished work. It explained the reason for giving owners of unpublished plays a new right, "if it be a dramatic work and not reproduced in copies for sale, *to vend any manuscript or any record whatsoever*" (17 U.S.C. Section 1(d), emphasis added). The Committee felt called upon to explain why unpublished dramatic works were given this new right. The entire explanation follows:

> "There has been a good deal of discussion regarding subsection (*d*) of section 1. This section is intended to give adequate protection to the proprietor of a dramatic work. It is usual for the author of a dramatic work to refrain from reproducing copies of the work for sale. He does not usually publish his work in the ordinary acceptation of the term, and hence in such cases never receives any royalty on copies sold. His compensation comes solely from public representation of the work. It has sometimes happened that upon the first production of a dramatic work a stenographer would be present and would take all the words down and would then turn the manuscript over to some one who had hired him to do the work or sell it to outside parties. This manuscript would then be duplicated and sold to persons who, without any authority whatever from the author, would give public performances of the work. It needs no argument to demonstrate how great the injustice of such a proceeding is, for under it the author's rights are necessarily greatly impaired. If an author desires to keep his dramatic work in unpublished form and give public representations thereof only, this right should be fully secured to him by law. We have endeavored to so

frame this paragraph as to amply secure him in these rights."

The right of performance, especially as applied to the then new technology, was discussed specifically in relation to music. The new technology at that time was phonograph records, music rolls, etc. The previous year this Court had held that the copyright law prior to 1909 did not give copyright owners a right with respect to the manufacture of phonograph records because the records were held not to be copies of the work (*White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908)). The Congress wanted to be sure that a composer's right as to *manufacture* was safeguarded and it took it for granted that the right of *performance* applied to the rendition of a work by mechanical means even though the recording itself was not a copy. A new right to *record* was granted to musical works and was also applied to dramatic works. The right of performance was not changed, but it was made clear that any rendition by mechanical means was a performance, whether the copyrighted work was dramatic or musical.*

Certain limitations were imposed on the right of performance with respect to musical compositions. Those limitations are set forth in Sections 1(e) and 104 of Title 17 (*supra*, p. 10). Congress having enacted certain limitations with respect to the right of performance, it is submitted that the Courts should not impose any additional limitations.

The following excerpts from the Report indicate the intention of Congress:

"Your committee have felt that justice and fair dealing, however, required that when the copyrighted music of a composer was appropriated for mechanical

* Literary works other than sermons were not given a right of performance until 1952—17 U.S.C. Sec. 1(c).

reproduction the composer should have some compensation for its use and that the composer should have the further right of forbidding, if he so desired, the rendition of his copyrighted music by the mechanical reproducers." (p. 6)

* * *

"The original bill provided that when the rights of public performance were desired the notice should include the statement 'rights of public performance reserved.' Since the right of public performance is as clearly incidental to the general right as is the right of translation or dramatization and is so treated in the bill, specific notice of it seems as little requisite as in the case of other subsidiary rights." (p. 13)

**B. The Copyright Act itself, particularly Section 1(e), shows the intent of Congress to treat one who activates a receiving device as a "performer".**

The Copyright Law clearly shows that an individual activating a device that reproduces a performance of a musical composition is himself performing the work. For example, Section 1(e) grants the exclusive right "to make any arrangement or setting of [a musical composition] or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced." This is similar to the right accorded dramatic works in Section 1(d) which is "to make or to procure the making of any transcription or record thereof by or from which, in whole or part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced". With respect to musical works, this right is limited by according to any manufacturer the right to record the musical work upon the payment of 2¢ if the work has been previously recorded with the consent of the copyright owner.

These mechanical devices ushered in a new technology which was followed by radio broadcasting, then television, and now cable television. Regardless of the manner in which a performance occurred it was made clear that the person immediately responsible for the rendition of the work was himself performing it. The performance was a separate right from the right to make the record. There was no question that the rendition was a performance and the right of performance was independent of the right to record. Section 1(e) provides "The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright *except in case of public performance for profit.*" (Emphasis added.) Clearly the application of a phonograph needle to the record, which resulted in a duplicate of the performance, was itself a performance of the work, but it created no liability unless the person activating it did so for purposes of profit and made it available to the public.

Another provision of Section 1(e) which relates to renditions by coin-operated machines also indicates that the activation of the machine and the resulting rendition is a performance by the person who causes the mechanical rendition. That provision exempts certain renditions—those for which an admission fee is not charged. The rendition is a performance by any person who activates the mechanism but there is no liability unless an admission fee is charged. The provision reads as follows:

> "The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."

**C. *Jewell-LaSalle* rather than *Fortnightly* should be applied to the Teleprompter type of cable system. This would carry out the clear mandate of the Congress that reproductions of performances by mechanical means were to be treated as new performances.**

It seems clear that the Congress in 1909 was aware of a new technology that made it possible to reproduce performances by mechanical means, and that such reproductions or renditions were themselves to be regarded as performances. *Fortnightly* reached a contrary conclusion as to the type of cable system then before this Court. The Court recognized that its interpretation of the copyright law differed from the Court in *Jewell-LaSalle*, but it did not overrule *Jewell-LaSalle*. We urge that the Court should apply the *Jewell-LaSalle* interpretation of the 1909 law to the facts of the present case, either letting *Fortnightly* remain as a decision limited to its facts or overruling it prospectively in the light of facts concerning legislative history and business practices that were not before the Court in *Fortnightly*.

*Jewell-LaSalle* was criticized in *Fortnightly* on three grounds: (1) that in holding the reproduction at the hotel to be a "performance" the Court was influenced by the fact that the original broadcast was unlicensed; (2) that legislative history showed an intention by the 1909 Congress to limit the right of performance to the "conventional situation", *i.e.*, a live theatrical performance; (3) that the performing rights organizations have not applied the *Jewell-LaSalle* decision beyond its own limited facts.

We have already discussed the statute itself and legislative history. It is clear that the *Jewell-LaSalle* Court did not rest its decision on the absence of a license by the original broadcaster. The question certified to this Court by the Eighth Circuit was (*Jewell-LaSalle* at 195-196):

> "Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a

radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of 17 USC Sec. 1 (e)1"

Mr. Justice Brandeis, writing for a unanimous Court, applied the policy enunciated in the 1909 Report and in the statutory design, in holding that "a monopoly is expressly granted of all public performances for profit" (*Jewell-LaSalle*, at 197), and that (at 201-202):

> "The modulation of the radio waves in the transmitting apparatus, by the audible sound waves is comparable to the manner in which the wax phonograph record is impressed by the same waves through the medium of a recording stylus. The transmitted radio waves require a receiving set for their detection and translation into audible sound waves, just as the record requires another mechanism for the reproduction of the recorded composition. In neither case is the original program heard; and, in the former, complicated electrical instrumentalities are necessary for its adequate reception and distribution. Reproduction in both cases amounts to a performance."

The Report and the Act both make it clear that the reproduction is a performance.

Home viewers of television programs who activate receiving sets are more nearly like home operators of phonographs, cassettes or other reproducing devices than they are like members of a theatre audience. Although the operator of reproducing devices is a performer, the Report and Statute make it clear that he is not liable for infringe-

ment unless he invites the public, if it is a drama, and also performs "for profit", if it is a musical composition.

The legislative history and authoritative interpretions of the 1909 law concerning performances by use of mechanical devices establish that a "performance" is given when one activates mechanical devices that reproduce a performance, whether on the part of radio and television broadcasting, wired music system, radio reception and phonographic reproduction. Accordingly, it is respectfully submitted that the Court should reexamine the question of whether the framers of the Copyright Act contemplated a "performance" as being limited to the "conventional situation" referred to in *Fortnightly*—of a performance of a play in a theatre (citing the reference in the report to unauthorized copies of an unpublished play made while witnessing a performance—a reference made for an entirely different purpose).* The *Fortnightly* Court concluded from this reference that the Congress was unaware of any new technology, and would have treated all viewers as members of a theatre audience even if their viewing resulted from their own activation of mechanical devices. This led the Court to conclude that "viewers do not perform" citing *Buck* v. *Debaum*, 40 F.2d 735 (S.D. Cal. 1929)—a District Court decision repudiated on this point in *Jewell-LaSalle*.

It is submitted that legislative history and the statutory scheme contemplate that the viewer who activates a reproduction by mechanical means (whether it be a phonograph, tape, cassette or television receiving set) is a participant in a performance. If that is a proper analysis, it should be held that cable systems such as Teleprompter do perform.

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* The Court in *Fortnightly* referred to a statement in the Report with respect to the circulation of unauthorized manuscripts of unpublished plays, a discussion which had nothing to do with the statutory right of performance (*Fortnightly* at 398, n. 22, referring to its earlier note 15 discussed *supra* at p. 12).

**The statement in Nimmer on Copyright that *Jewell-LaSalle* has not been applied in practice, which this Court accepted in *Fortnightly*, has been found to be incorrect.**

In *Fortnightly*, the Court referred to *Jewell-LaSalle* as "a questionable 35-year-old decision that in actual practice has not been applied outside its own factual context, *post*, at 405, n. 3". (392 U.S. at 401, n. 30.) The Court relied on this statement in Nimmer on Copyright:

> "Nimmer, a leading authority in the copyright field, states that although 'the two major performing right societies, ASCAP and BMI, do not choose to enforce the Jewell-LaSalle doctrine to its logical extreme in that they do not demand performing licenses from commercial establishments such as bars and restaurants which operate radio or television sets for the amusement of their customers, . . . such demands are made of hotels which operate in the manner of the LaSalle Hotel.' M. Nimmer, Copyright § 107.41, n. 204 (1968)." (392 U.S. at 405, n. 3.)

This statement by Nimmer was challenged and found to be incorrect in *Twentieth Century Music Corp.* v. *Aiken*, 356 F. Supp. 271 (W.D. Pa. 1973), where the court said:

> "Herman Finkelstein, a witness for ASCAP, disputes the comment in Nimmer (Copyright § 10741, note 204, 1968) that licenses have not been required from commercial establishments such as bars and restaurants which operate radio sets for the amusement of the customers. See the reference to this text in the Fortnightly dissent, page 405, n. 3. We credit the testimony of Mr. Finkelstein that Nimmer is incorrect and that ASCAP has in fact been requiring licenses in many of these situations." (356 F. Supp. at 274, n. 4.)

We believe the erroneous statement of Nimmer was an important factor in reaching the conclusion that *Jewell-LaSalle* should be "limited to its own facts" (392 U.S. at 397, n. 18). The actual practice in issuing licenses is important when a court is called upon to impose substantial liability on a new industry as a result of which the very existence of the industry (facing large retroactive liability) might be endangered. There is no such threat at this time. If testimony is required to establish these facts, the case should be sent back to complete the record.

## II.

**The cable systems operated by Teleprompter, unlike the primitive systems considered in *Fortnightly*, receive more money from the public for the use of copyrighted works—at least musical works—than many of the stations whose programs they carry. If the cable systems do not pay the composer, the purpose of the Copyright Law will be defeated—a disservice to the public.**

To date, public television stations have paid little or nothing to the composers whose works are used by symphony orchestras. The stations contend that they do not perform "for profit" and are not obligated to pay anything to the composer whose works are used.

When those programs are picked up by Teleprompter and other commercial cable systems they form a valuable part of the entertainment package delivered to their subscribers. The 1909 Report emphasized the "purpose of securing to the composer an adequate return for all use made of his composition" (Report, 7; App. 8a).

If *Fortnightly* is applied to such cable systems as Teleprompter, their profits will increase at the composer's ex-

pense. Either the "public" television stations and many commercial UHF stations which are not profitable will have to add to their expenses—to clear rights for cable systems, whether local or distant—or the composer will be denied an "adequate return" for some of the most important uses of his works. This would defeat the policy of the copyright law and would be contrary to the public interest.

## III.

**_Fortnightly_ should either be limited to its facts or should be overruled prospectively, possibly as of January 1, 1975, to give the present Congress an opportunity to enact new legislation.**

If *Fortnightly* is limited to its own facts and a new principle is announced as a guide to the situations in which a "performance" will be held to have occurred, the small old-fashioned systems can be protected against liability on the basis of the prior decision, as in *Flood* v. *Kuhn*, 407 U.S. 258 (1972). In that case, a prior decision of long standing, involving baseball, was adhered to because of business relationships built up in reliance on it, notwithstanding that the decision could not otherwise be supported.

Any new principle announced which may be at variance with *Fortnightly* can be applied prospectively under the "Sunburst" doctrine. *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932); *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971); *Spanel* v. *Mounds View School Dist. No. 621*, 364 Minn. 279, 118 N.W.2d 795 (1962); see Walter V. Schaefer, *The Control of Sunbursts; Techniques of Prospective Overruling* (1967).

## CONCLUSION

**That part of the decision of the Court of Appeals which affirmed the District Court decision and exempted Teleprompter from liability with respect to programs from nearby stations should be reversed; the part of the decision of the Court of Appeals which reversed the District Court decision and imposed liability with respect to programs from distant stations should be affirmed.**

Respectfully submitted,

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60TH CONGRESS, 2d Session. HOUSE OF REPRESENTATIVES. REPORT No. 2222.

TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT.

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FEBRUARY 22, 1909.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

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Mr. CURRIER, from the Committee on Patents, submitted the following

REPORT.

[To accompany H. R. 28192.]

The Committee on Patents, to whom was referred House bill 28192, respectfully report that they have had the same under consideration and recommend that it do pass.

For years men familiar with the copyright laws of this country have urged the necessity of a complete revision. In a notable address on "Our archaic copyright laws," delivered before the Maine State Bar Association by Hon. Samuel J. Elder, a distinguished member of the Boston bar, he said:

> The whole system, in the light of an interpretation by the courts, calls for a revision. The courts are more and more called upon to consider these questions. And besides this, the reproduction of various things which are the subject of copyright has enormously increased. The wealth and business of the country and the methods and means of duplication have increased im-

measurably. The law requires adaptation to these modern conditions. It is no longer possible to summarize it in a few sections covering everything copyrightable. It should be revised so that protection to the honest literary worker, artist, or designer shall be simple and certain.

The pressing need of a revision of the copyright laws was urged by the President in his message to Congress in December, 1905. He said:

> Our copyright laws urgently need revision. They are inperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection; they impose hardships upon the copyright proprietor which are not essential to the fair protection of the public; they are difficult for the courts to interpret and impossible for the Copyright Office to administer with satisfaction to the public. Attempts to improve them by amendments have been frequent, no less than 12 acts for the purpose having been passed since the Revised Statutes. To perfect them by further amendments seems impracticable. A complete revision of them is essential. Such a revision, to meet modern conditions, has been found necessary in Germany, Austria, Sweden, and other foreign countries, and bills embodying it are pending in England and the Australian colonies. It has been urged here, and proposals for a commission to undertake it have, from time to time, been pressed upon the Congress.
>
> The inconveniences of the present conditions being so great, an attempt to frame appropriate legislation has been made by the Copyright Office, which has called conferences of the various interests especially and practically concerned with the operation of the copy-

right laws. It has secured from them suggestions as to the changes necessary; it has added from its own experience and investigation, and it has drafted a bill which embodies such of these changes and additions as, after full discussion and expert criticism, appeared to be sound and safe. In form this bill would replace the existing insufficient and inconsistent laws by one general copyright statute. It will be presented to the Congress at the coming session. It deserves prompt consideration.

Mr. Thorvald Solberg, register of copyrights, in the introduction to his book on Copyright in Congress, gives reasons for a revision of the copyright laws, as follows:

> It is doubtful if the enactment of further merely partial or temporizing legislation will afford satisfactory remedies for the insufficiencies and inconsistencies of the present laws. The subject should be dealt with as a whole, and the insufficient and antiquated laws now in force be replaced by one consistent, liberal, and adequate statute.
>
> The laws as they stand fail to give the protection required, are difficult of interpretation, application, and administration, leading to misapprehension and misunderstanding, and in some directions are open to abuses. (pp. 1-2)

* * *

There has been a good deal of discussion regarding subsection (*d*) of section 1. This section is intended to give adequate protection to the proprietor of a dramatic work. It is usual for the author of a dramatic work to refrain from reproducing copies of the work for sale. He does not usually publish his work in the ordinary acceptation of the term, and hence in such cases never receives any royalty on copies sold. His compensation comes solely from public representation of the work. It has sometimes

happened that upon the first production of a dramatic work a stenographer would be present and would take all the words down and would then turn the manuscript over to some one who had hired him to do the work or sell it to outside parties. This manuscript would then be duplicated and sold to persons who, without any authority whatever from the author, would give public performances of the work. It needs no argument to demonstrate how great the injustice of such a proceeding is, for under it the author's rights are necessarily greatly impaired. If an author desires to keep his dramatic work in unpublished form and give public representations thereof only, this right should be fully secured to him by law. We have endeavored to so frame this paragraph as to amply secure him in these rights.

Subsection (e) of section 1 of the bill, which deals with the reproduction of music by mechanical means has been the subject of more discussion and has taken more of the time of the committee than any other provision in the bill. Many propositions looking to a solution of this question have been submitted and discussed, and much difficulty has been experienced in reaching an agreement, but the paragraph as it now stands in the bill is believed by the members of the committee to be a fair and just solution of the whole question. In speaking of this matter a well-informed writer says:

> It is not a theoretical question, as it was twenty years ago, but an intensely live issue affecting the livelihood of many people and the soundness of investments aggregating many millions of dollars.

Not only in the United States but in England and nearly all the countries in Europe this question is troubling the courts and the legislative bodies. No legislative body in the world has as yet taken such advanced ground in the line of securing the rights of composers in the matter of

the reproduction by mechanical means of their music as is contemplated by this bill. Several of the leading countries of the world have provided by law that anyone may with perfect freedom and without any compensation to the composer reproduce by mechanical means copyrighted music. Only one country, so far as your committee is informed, has by legislation placed any restriction upon such use of copyrighted music, and that is Germany. In 1901 the German musical copyright law was passed. Section 22 of that law reads as follows:

> The sale of disks, plates, cylinders, strips, and other parts of instruments which serve mechanically to reproduce musical compositions is permitted—

Except when the rendition—

> in respect to dynamic power, duration of tone, and tempo is in a manner similar to a personal performance.

That covers only the reproduction of music by an instrument like the Metrostyle, by which the individual expression of the performer is given in the mechanical reproduction. It in no way affects the reproduction of such music by phonographs, graphophones, or the ordinary piano-playing instruments, for in these instruments the reproduction is purely mechanical. Austria, in 1895, enacted a law which provides that—

> The manufacture and public use of instruments for mechanical reproduction of music records shall be no infringement of copyrighted music.

England, in 1906, enacted into law the bill known as the "T.P. O'Connor bill," which provides that—

> The expressions "pirated copies" and places shall not for the purposes of this act be deemed to include perforated musical rolls.

We are not aware that any other countries have passed laws regarding this matter. In France, however, it has been judicially decided that while the reproduction of a musical composition by means of a talking machine is no violation of a composer's right, the words of a song may not be reproduced. Only one country in the world, so far as we know, now prohibits, without the consent of the composer, the reproduction of music on a phonograph or similar machine, and that is Italy. This is the result not of legislation, but is based upon a decison of a court, not the court of last resort, although pending a decision by such court of last resort the decision is effective.

In 1883 a conference was held at Berne, Switzerland, by those affirmatively interested in copyright legislation, and in 1884 there was held at Berne the first international conference for the protection of the rights of authors. At this meeting representatives were present from Austria, Belgium, Costa Rica, France, Germany, Great Britain, Haiti, Italy, the Netherlands, Salvador, Sweden and Norway, and Switzerland, and as the result of their deliberations there was prepared a "Draft convention for the creation of a general union for the protection of the rights of authors;" and in 1886, at another conference held in Berne, the final text of the Berne convention was agreed to and signed by the representatives of Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland, and Tunis. In 1896 there was a further international conference regarding this matter held in Paris, which modified the text of the Berne convention, and at this conference Belgium, France, Germany, Italy, Luxemburg, Monaco, Montenegro, Spain, Switzerland, and Tunis were represented.

Last year another conference was held at Berlin, and the following signatory states were represented: Belgium, Denmark, France, Germany, Great Britain, Italy, Japan, Luxemburg, Monaco, Norway, Spain, Sweden Switzerland and Tunis. The United States has never been a party to any of

these conventions, although at the Berlin conference this country, with a number of others, had delegates present to make observations, but with no power to vote or take part in the discussions. A new convention was there agreed upon and signed by the representatives of the states of the countries belonging to the copyright union. Article 13 of that convention recommends for adoption by the countries of the union the granting to authors of musical works of the exclusive right to control the reproductions of their compositions by mechanical means, but provides that—

> The limitations and conditions relative to the application of this article shall be determined by the domestic legislation of each country in its own case; but all limitations and conditions of this nature shall have an effect strictly limited to the country which shall have adoped them—

And it is further provided in that article that the provision shall have no retroactive effect. The provision has no effect whatever in any country of the union until that country decides to pass the necessary legislation.

Your committee have felt that justice and fair dealing, however, required that when the copyrighted music of a composer was appropriated for mechanical reproduction the composer should have some compensation for its use and that the composer should have the further right of forbidding, if he so desired, the rendition of his copyrighted music by the mechanical reproducers. How to protect him in these rights without establishing a great music monopoly was the practical question the committee had to deal with. The only way to effect both purposes, as it seemed to the committee, was, after giving the composer the exclusive right to prohibit the use of his music by the mechanical reproducers, to provide that if he used or permitted the use of his music for such purpose then, upon the payment of a reasonable royalty, all who desired might reproduce the music. (pp. 4-6)

* * *

The main object to be desired in expanding copyright protection accorded to music has been to give to the composer an adequate return for the value of his composition, and it has been a serious and a difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests. (p. 7)

* * *

The exception regarding the public performance of a musical composition upon coin-operated machines in a place where an admission fee is not charged is understood to be satisfactory to the composers and proprietors of musical copyrights. A representative of one of the largest musical publishing houses in the country stated that the publisher finds the so-called "penny parlor" of first assistance as an advertising medium. (p. 9)

* * *

The original bill provided that when the rights of public performance were desired the notice should include the statement "rights of public performance reserved." Since the right of public performance is as clearly incidental to the general right as is the right of translation or dramatization and is so treated in the bill, specific notice of it seems as little requisite as in the case of other subsidiary rights. (p. 13)

* * *

The existing law provides that any person publicly performing a dramatic or musical composition without the consent of the proprietor of the copyright shall be liable for damages of not less than $100 for the first and $50 for every subsequent performance, and this prohibition covers cases of public performances where the performance is not for profit. We have provided in this section that where the public performance is given by public schools, etc., for educational or

charitable purposes and not for profit it may be done without subjecting those who give the performance to any suit for damages, and we further provide that the music used for the performance may be rented, borrowed, or obtained from public libraries or other public schools, etc. (pp. 16-17)

• • •

Section 41 is not intended to change in any way existing law, but simply to recognize the distinction, long established, between the material object and the right to produce copies thereof. The concluding clause in the section, that "nothing in this act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a work copyrighted under this act the possession of which has been lawfully obtained," is inserted in order to make it clear that there is no intention to enlarge in any way the construction to be given to the word "vend" in the first section of the bill. Your committee feel that it would be most unwise to permit the copyright proprietor to exercise any control whatever over the article which is the subject of copyright after said proprietor has made the first sale. (p. 19)

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